The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law

Marina Aksenova*

Abstract

The 'specific direction' saga has been dominating the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia for nearly two years, and the end is yet to be seen. The story centres on the correct interpretation of liability for aiding and abetting, while, at the same time, exposing broader concerns of international criminal law. The saga started with unexpected acquittals of defendants in the *Perišić*, *Stanišić*, and *Simatović* cases due to a lack of specific direction in their aid and assistance towards specific offences. More specifically, the Tribunal found that the traditional test—the provision of aid with the awareness that it would have a substantial effect on the crimes committed in the context of war—was insufficient to create individual criminal responsibility in these cases. The response to this new and heightened interpretation of aiding and abetting followed quickly, as the *Šainović et al* appeal judgment rejected the novel requirement. After this judgment, the prosecution filed a motion to reconsider the acquittal in *Perišić*, which the Appeals Chamber denied. In sum, these developments diluted and mischaracterised the standard of aiding and abetting. Accordingly, this article has two purposes. First, it demonstrates that the innovative element of the specific direction lacks a proper foundation in international law. Second, the article discusses several conceptual difficulties with the specific direction requirement, some of which go beyond the issues of accomplice liability. This article concludes by finding that comparative criminal law is essential to resolving the legal conundrum that this standard causes.

Keywords

Aiding and Abetting, Specific Direction, Comparative Criminal Law, Sources of Law, General War Effort

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1 Introduction

This article critically assesses recent developments in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In particular, it examines the acquittals of General Momčilo Perišić, the former state security chief Jovica Stanišić, and the former paramilitary leader Franko Simatović based on a lack of specific direction in their aid and assistance towards various crimes.¹ The novel interpretation of the conduct requirement of aiding and abetting as containing a specific direction element quickly became a contentious issue.² The words of Judge Picard—the dissenting voice in the *Stanišić and Simatović* case—reflect the level of controversy attached to this new restrictive formulation of accessory liability: ‘[i]f we cannot find that the Accused aided and abetted those crimes, I would say we have come to a dark place in international law indeed.’³ Concerns regarding this enhanced standard ultimately led to its rejection by the majority in *Šainović et al.*⁴ Indeed, the Appeals Chamber held that specific direction is not an element of aiding and abetting liability under customary international law.⁵

There is merit in briefly tracing the evolution of the problem. The specific direction saga started in the *Perišić* case, when the Appeals Chamber interpreted the *actus reus* of aiding and abetting to require that the assistance is specifically directed towards the crimes.⁶ The justification for this additional element was the need to address situations where the accused’s individual assistance is remote from the actions of principal perpetrators or when such assistance could be used for both lawful and unlawful activities.⁷ In such circumstances, the Chamber reasoned, it is necessary to establish ‘a *direct link* between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators’.⁸ In line with this restrictive formulation of

¹ *Prosecutor v Perišić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013); *Prosecutor v Stanišić and Simatović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-69-T, 30 May 2013). Compare *Prosecutor v Taylor (Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No 03-1-A, 26 September 2013) 473.

² Kevin Jon Heller, ‘Why the ICTY’s “Specifically Directed” Requirement Is Justified’ (*Opinio Juris Blog*, 2 June 2013) <<http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/>> accessed 21 March 2015. Compare Jens David Ohlin, ‘Why did the ICTY Acquit Stanisic and Simatovic?’ (*Lieber Code Blog*, 1 June 2013) <<http://www.liebercode.org/2013/06/why-did-icty-acquit-stanisic-and.html>> accessed 21 March 2015; James G Stewart, ‘The ICTY Loses its way on Complicity’ (*Opinio Juris Blog*, 3 April 2013) <<http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>> accessed 21 March 2015.

³ *Stanišić and Simatović* (n 1) (Judge Michèle Picard in dissent) 2406.

⁴ *Prosecutor v Šainović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-05-87-A, 23 January 2014) 1649. See also *Prosecutor v Popović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88-A, 30 January 2015) 1758.

⁵ *ibid* 43, 47 (Judge Tuzmukhamedov dissented on this point).

⁶ *Perišić* (n 1) 44.

⁷ *ibid* 44, 73.

⁸ *ibid* 44 (emphasis added).

accessory liability, the Appeals Chamber overturned Perišić's conviction for aiding and abetting the Army of the Republika Srpska (VRS) in his capacity as Chief of the Yugoslav Army General Staff. The Appellate Chamber made this decision notwithstanding that Perišić, as the most senior figure in the Yugoslav Army, knowingly provided logistical and personnel assistance to the VRS, which was then committing serious crimes in Sarajevo and Srebrenica.⁹

The factual findings of the *Perišić* Appeals Chamber on the relationship between the Yugoslav Army and the VRS differ from the previous jurisprudence of the ICTY.¹⁰ The earlier *Tadić* appeal judgment concluded that these two entities did not constitute two different armies, but rather one entity that shared military objectives. For this reason, there was no need to prove that the Yugoslav Army authorities specifically charged the VRS with committing crimes, since these forces were of the same mind.¹¹ The rationale for the *Perišić* acquittal was the Chamber's reluctance to find that the accused's assistance was specifically directed to supporting criminal activities, and not just towards the general war effort.¹² The VRS was conceptualised as 'an army fighting a war' rather than an organisation whose actions were criminal *per se*.¹³ Thus, the judges concluded that since not all of the VRS activities were criminal in nature, the policy of providing assistance to the VRS's general war effort did not, in itself, demonstrate that the assistance facilitated by Perišić was specifically directed towards aiding these crimes.¹⁴

The same type of reasoning surfaced in the *Stanišić and Simatović* trial judgment.¹⁵ The accused in this case organised and directed a special unit within the Serbian state security service, which they knew committed crimes of murder, deportation, forcible transfer, and persecution.¹⁶ The special unit operated covertly and was involved in a number of military operations.¹⁷ The Chamber fell short of declaring it a criminal organisation due to the fact that not all of its activities were criminal or resulted in the commission of offences. The extensive involvement of the accused with the operation of the unit led the judges to conclude that their contributions assisted in the commission of the crimes by the unit members.¹⁸ However, since the accused were not physically present in the field during operations, the judges found that their assistance may have been directed towards the legitimate military objective of establishing and maintaining Serb control and not the criminal goals.¹⁹

⁹ *ibid* 44, 62, 68.

¹⁰ Lelia Nadya Sadat, 'Can the ICTY *Šainović* and *Perišić* cases be Reconciled?' (2014) 108 *AJIL* 3, 475–485.

¹¹ *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 151–53.

¹² *ibid*.

¹³ *ibid* 53.

¹⁴ *ibid*.

¹⁵ *Stanišić and Simatović* (n 1) 2360.

¹⁶ *ibid* 2318, 2323.

¹⁷ *ibid* 1423, 1426.

¹⁸ *ibid* 2359.

¹⁹ *ibid* 2360.

The new and stricter standard of aiding and abetting liability quickly reemerged in the ICTY Appeals Chamber. Here, Vladimir Lazarević's defense team contested his conviction for aiding and abetting deportation and forcible transfer on the grounds that the Trial Chamber had failed to determine whether his alleged acts and omissions were specifically directed to assist the commission of these crimes.²⁰ The Appeals Chamber subsequently rejected the specific direction requirement finding a clear divergence between the *Perišić* standard and the previous jurisprudence of the ICTY.²¹

The specific direction saga did not end with the dismissal of the contentious criterion in the *Šainović et al* appellate judgment. Following this judgment, the ICTY Office of the Prosecutor attempted to reverse the acquittal in *Perišić* by filing a motion seeking reconsideration.²² The Appeals Chamber denied this request, finding that there were not 'cogent reasons in the interests of justice' to reconsider a final judgment.²³ It is disappointing that this brief decision does not elaborate on what constitutes 'cogent reasons in the interests of justice' and why the present circumstances do not meet this test. Moreover, the *Šainović et al* rejection of the specific direction requirement does not necessarily dispose of the issue in its entirety because the pronouncement by one Appeals Chamber does not formally overrule the conflicting statement on the same issue furnished by the different Appeals Chamber.²⁴ Accordingly, it is important to furnish a complete set of arguments against this problematic interpretation of aiding and abetting. Comparative criminal law is an essential instrument in this exercise, as it helps to uncover the unclear foundation of the new standard.

The aim of this article is to investigate the validity of the restrictive interpretation of *actus reus* for aiding and abetting. This inquiry proceeds in two parts. The first part

²⁰ *Šainović et al* (n 4) 1617.

²¹ *ibid* 1621. Similarly, the Vinko Pandurević defense team argued in *Popović et al* that the defendant's lawful actions were not specifically directed towards the unlawful removal of civilians from their residence. The Appeals Chamber dismissed this claim maintaining that specific direction is not an element of aiding and abetting under customary international law. See *Popović et al* (n 4) 1758, 1761, 1765.

²² Statement of Prosecutor Serge Brammertz in relation to the motion for reconsideration submitted by the Prosecution in the *Perišić* case, 3 February 2014 <<http://www.icty.org/sid/11447>> accessed 21 March 2015.

²³ *Prosecutor v Perišić (Decision on Motion for Reconsideration)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No 04-81-A, 20 March 2014). Sadat raises questions about the appropriate standard of review on appeal in international criminal law cases: Sadat (n 10) 484.

²⁴ Art 25(2) of the ICTY Statute (SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009)) establishes the hierarchy between the trial and the appeal stages by providing that '[t]he Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers', but it is silent on the interaction between the two conflicting appeal judgments. The general rule established in *Aleksovski* is that the Appeals Chamber should follow its previous decisions for the reasons of legal certainty and predictability, unless the previous decision has been decided based on a wrong legal principle or the judges were ill informed about the applicable law. This rule does not however regulate the situations when the judgements are already in conflict with each other. *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) 107–08. See also William A Schabas, 'Prosecutor Applies to Reverse Final Acquittal in *Perišić*' (*PhD Studies in Human Rights Blog*, 7 February 2014) <<http://humanrightsdoctorate.blogspot.co.uk/2014/02/prosecutor-applies-to-reverse-final.html>> accessed 21 March 2015.

examines whether the additional requirement of specific direction has any foundation in the sources of international law, while the second part illustrates several conceptual problems with the specific direction requirement. This enhanced standard for aiding and abetting presents difficulties in terms of both legality and application. Moreover, this recent development has far-ranging implications that go beyond the difficulties of attaching liability to the accused when removed from the scene of the crime and raises a crucial question for modern international criminal law: what are the legal boundaries of the ‘general war effort’?

2 The specific direction requirement in the sources of international law

The approach of the *Perišić* Appeals Chamber and the *Stanišić and Simatović* Trial Chamber raises several concerns. Foremost, this interpretation of aiding and abetting rests on a very tenuous legal foundation. The majority in the *Šainović et al* Appeals Chamber recognised this point and rejected specific direction as an element of *actus reus* in aiding and abetting for this very reason.²⁵ This rejection is not surprising, since one finds almost no trace of the specific direction requirement within the primary sources of international law, listed in the article 38(1) of the Statute of the International Court of Justice.²⁶

2.1 The lack of recognition of specific direction in the ICTY Statute and customary international law

Article 7(1) of the ICTY Statute addresses individual criminal responsibility. It states:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The Statute is thus silent on the legal requirements for each form of responsibility. The ICTY Appeals Chamber clarified that the Statute only provides an *a priori* jurisdictional framework *ratione personae*, and that customary international law determines the existence of a particular form of liability as well as its legal requirements.²⁷ Custom is a notoriously ambiguous source for defining human rights obligations and international

²⁵ *Šainović et al* (n 4) 1650.

²⁶ These sources comprise international conventions, international custom, and the general principles of law recognised by civilised nations. See Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 38(1).

²⁷ *Prosecutor v Milutinović et al* (*Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-37-AR72, 21 May 2003) 9–10 (quoting Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993) 21). See also *Prosecutor v Delalić et al* (*Čelebići Case*) (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-

criminal law provisions.²⁸ One reason for this ambiguity is that tribunals often avoid making a distinction between the two constituent elements of custom: *opinio juris* and state practice.²⁹ This approach is understandable because international criminal law is a peculiar field of law and the state practice element of custom often points to an undesirable outcome (ie, a violation).³⁰

It should be noted that the International Committee of the Red Cross (ICRC) developed a list of customary rules of international humanitarian law accompanied by practice.³¹ Some provisions are generally relevant for interpreting international criminal law. For example, Rule 151 stipulates that individuals are criminally responsible for war crimes they commit. Extensive practice cited to support this rule includes treaty provisions, decisions of the UN organs, jurisprudence of international and national courts, and domestic legislation.³² Nonetheless, it is difficult to discern particular elements of individual criminal responsibility from the plethora of divergent approaches and formulations presented as practice. This is, in part, due to the distinctive objectives pursued by international criminal law and international humanitarian law.

Is then the specific direction as an *actus reus* element of aiding and abetting part of customary international law? The *Perišić* Appeals Chamber and the *Stanišić and Simatović* Trial Chamber answered this question in the affirmative, while the *Šainović et al* Appeals Chamber strongly rejected this position.³³ In *Perišić*, the judges ruled that there are no cogent reasons to depart from the first appeal judgment setting out the parameters of aiding and abetting liability, namely the *Tadić* appeal judgment.³⁴ *Tadić* held that '[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime'.³⁵ This interpretation of 'aiding and abetting', stated in *Tadić* and restated in *Furundžija*, proved authoritative,

96-21-A, 20 February 2001) 178, and commentary in Guénaél Mettraux, *International Criminal and the Ad Hoc Tribunals* (OUP 2005) 270.

²⁸ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–1989) 12 AYIL 82, 82–108.

²⁹ Boas, Bischoff and Reid argue that the most worrying characteristic of the *Tadić* decision is the methodology used to establish the rules of customary international law. International judgments pursuant to Control Council Law No 10—supporting in *Tadić* the existence of common purpose liability—do not amount to state practice. See Gideon Boas, James L Bischoff and Natalie L Reid, *International Criminal Law Practitioner Library: International Criminal Procedure* (CUP 2007) 21–22.

³⁰ Michael Wood, Special Rapporteur, *First Report on Formation and Evidence of Customary International Law*, UN Doc A/CN.4/663 (17 May 2013) para 70. See also L van den Herik, 'Using Custom to Reconceptualise Crimes Against Humanity' in Shane Darcy and Joseph Powderly (eds) *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 93, 101.

³¹ International Committee of the Red Cross, *Customary International Humanitarian Law* (2005) Volume I: Rules <<http://www.refworld.org/docid/5305e3de4.html>> accessed 21 March 2015.

³² 'Practice Relating to Rule 151: Individual Responsibility' (ICRC 2005) <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule151> accessed 21 March 2015.

³³ *Perišić* (n 1) 28; *Stanišić and Simatović* (n 1) 1264; *Šainović et al* (n 4) 1649. See also Kai Ambos and Ousman Njikam, 'Charles Taylor's Criminal Responsibility' (2013) 11 J Intl Crim Justice 789.

³⁴ *Perišić* (n 1) 26, 28.

³⁵ *Tadić* (n 11) 229.

and subsequent jurisprudence merely clarified the elements established by these first two cases.³⁶ Nonetheless, the *Perišić* understanding of the *actus reus* for aiding and abetting differs substantially from that of the *Tadić* appeal judgment. The *Šainović et al* Appeals Chamber pointed exactly to this inconsistency, concluding that the *Perišić* approach significantly diverges from previous ICTY jurisprudence.³⁷

Due to their authoritative value in international criminal law and for the sake of clarity, it is worth summarising the elements of aiding and abetting as established by the *Tadić* and *Furundžija* judgments. An aider or abettor is an individual who provides 'practical assistance, encouragement, or moral support' to the principal.³⁸ Further, these actions must have a substantial effect on the perpetration of a crime.³⁹ The *Tadić* Trial Chamber borrowed this formulation of aiding and abetting from the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code), which called for criminal responsibility of the individual who 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime'.⁴⁰ The commentary to the ILC Draft Code does not define 'substantially', but notes that the assistance of the accomplice must facilitate the commission of a crime in some *significant* way.⁴¹ Based on these considerations, the *Tadić* Chamber clarified that the substantial contribution requirement presupposes a contribution that in fact has an effect on the commission of the crime.⁴² The *Furundžija* Chamber further elaborated on the effect of assistance, holding that the acts of the accomplice need not 'bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal'.⁴³ This finding underlines the derivative nature of aiding and abetting as an accomplice can only influence the conduct of the principal perpetrator to a certain extent and the final decision to commit or not to commit a crime rests with the perpetrator and not with the accomplice.⁴⁴

³⁶ Boas, Bischoff and Reid (n 29) 303–04.

³⁷ *Šainović et al* (n 4) 1621.

³⁸ *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) 235; *Čelebići* (n 27) 352; *Tadić* (n 11) 229.

³⁹ *Furundžija* (n 38) 223, 224, 249.

⁴⁰ Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission in 1996, UN Doc A/51/10 (1996), art 2(3)(d).

⁴¹ Commentary to the Articles of Draft Code of Crimes Against the Peace and Security of Mankind, ILC Ybk 1996/II(2), 21, art 2(3)(d), para 11 (emphasis added).

⁴² *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 688.

⁴³ *Furundžija* (n 38) 233. See also Judgment, *Prosecutor v Simić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-9-A, 28 November 2006) 85; *Prosecutor v Blaskić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) 48.

⁴⁴ Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 Cal L Rev 2, 323.

In addition to making a 'substantial' contribution, the ILC requires that an aider and abettor make a 'direct' contribution to the crime.⁴⁵ At the same time, the commentary to the ILC Draft Code does not offer a precise meaning of 'direct contribution'. This lack of clarity contributed to the confusion that followed. First, the *Tadić* Trial Chamber embraced the directness requirement by treating the accused as culpable when his participation 'directly and substantially affected the commission of the offence'.⁴⁶ In contrast, the *Furundžija* Chamber rejected the term 'direct' to describe the proximity between the assistance and the principal act as misleading since 'it may imply that assistance needs to be tangible, or to have a causal effect on the crime'.⁴⁷

It is noteworthy that post-Nuremberg criminal trials of war criminals, which informed the early *Furundžija* and *Tadić* cases, along with the provisions of the ILC Draft Code do not support the requirement that aid must be specifically directed towards the crimes. For example, in the trial of *Gustav Becker, Wilhelm Weber and Eighteen Others*, the Permanent Military Tribunal at Lyon convicted the former German customs officers in French Savoy for the illegal arrest and ill treatment of French citizens, which resulted in the death of the three victims later in Germany.⁴⁸ The tribunal found the accused responsible, as their acts were instrumental to the death of the victims. In addition to the illegal arrest and ill treatment, the judges found all of the defendants guilty of causing death. The tribunal made this pronouncement regardless of whether the injuries sustained in France were the direct cause of the subsequent death of the victims in Germany. The court did not evaluate whether the accused by abusing persons trying to cross the border specifically intended this result.⁴⁹ In *Zyklon B*, a similar and more widely cited case, the British Military Court in Hamburg convicted the owner of the firm supplying poison gas to concentration camps and the firm's proxy of war crimes and sentenced them to death. The defendants argued that the gas was to be used for lawful purposes, such as disinfection. The court disregarded these arguments holding that the accused knew that the gas was to be employed for killing people because they trained the SS officials to use it in a manner consistent with this purpose.⁵⁰ The court referred in its assessment to the defendants' *mens rea*, but not the conduct element.⁵¹

While the *Tadić* trial judgment set out the elements of aiding and abetting, the *Tadić* appeal judgment focused primarily on defining the notion of the joint criminal

⁴⁵ Commentary to the Articles of Draft Code of Crimes Against the Peace and Security of Mankind (n 41) 11, 21. For the discussion of this provision see also *Šainović et al* (n 4) 1647.

⁴⁶ *Tadić* (n 11), 692. The *Tadić* Appeal Chamber later used the 'specific direction' criterion to delimit aiding and abetting and participation in the joint criminal enterprise. See *Tadić* (n 31) 229.

⁴⁷ *Furundžija* (n 38) 232.

⁴⁸ *France v Becker* (1948) 7 LRTWC 67 (Permanent Military Tribunal at Lyon) 67–70.

⁴⁹ *ibid.*

⁵⁰ *United Kingdom v Tesch (Zyklon B Case)* (1947) 1 LRTWC 93 (British Military Court) 93–101. This case is referenced in the *Perišić* Appeal Judgment (n 1) n 115 and the *Šainović et al* Appeal Judgment (n 4) 1628.

⁵¹ Coco and Gal share this assessment of the *Zyklon B Case*. Antonio Coco and Tom Gal, 'Losing Direction: The ICTY Appeals Chamber's Controversial Approach in *Perišić*' (2014) 12 J Intl Crim Justice 345.

enterprise (common design).⁵² The *Tadić* appellate panel used the phrase ‘acts *specifically directed* to assist’ to compare responsibility for aiding and abetting to responsibility for joint criminal enterprise, which presupposes that the acts are in *some way directed* to the furtherance of a common design.⁵³ Thus, the emphasis was not on the physical proximity of the accomplice’s aid to the offence in question, but rather on the existence of the crime-specific relationship between the aider and abettor and the principal perpetrator. Importantly, the crime-specific relationship between the aider and abettor and the principal differs significantly from the group-specific relationship that characterises joint criminal enterprise.

In contrast, *Perišić* employed the terminology to stress the directness of the link between the aid and the crime.⁵⁴ In support of the specific direction requirement, *Perišić* cited a number of judgments emanating from the ICTY and the International Criminal Tribunal for Rwanda (ICTR) that either reproduce the wording of the *Tadić* appeal judgment verbatim or follow it very closely.⁵⁵ None of these judgments, however, elaborate on the original *Tadić* verdict.⁵⁶ As such, the *Perišić* Appeals Chamber evidently misinterpreted the *actus reus* element by misunderstanding the specific direction wording in the *Tadić* appeal judgment or by applying this wording out of context.⁵⁷ Moreover, on at least two occasions, the ICTY Appeals Chambers expressly rejected the idea that specific direction is an essential component of the *actus reus* for aiding and abetting.⁵⁸

The majority of the *Šainović et al* Appeals Chamber highlighted this point by noting that there is a clear divergence on the specific direction issue between the *Perišić*

⁵² *Tadić* (n 11) 229. The same point is being made in the *Šainović et al* Appeal Judgment (n 4) 1623.

⁵³ *ibid* (emphasis added).

⁵⁴ *Perišić* (n 1) 44.

⁵⁵ *ibid* 28–29.

⁵⁶ For example, in *Blagojević*, the Appeals Chamber simply acknowledged that the Trial Chamber did not err in restating the formulations and principles of aiding and abetting contained in the previous ICTY judgments. *Kvočka* and *Vasiljević* discussed the difference between perpetration by means of the joint criminal enterprise and aiding and abetting. *Simić* specified that the accused need not know ‘either the precise crime that was intended or the one that was, in the event, committed’, while *Orić* merely reiterated the minimum basic elements of aiding and abetting for the purposes of conviction for omission. See *Prosecutor v Blagojević and Jokić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007) 127–28; *Prosecutor v Kvočka, (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-T, 28 February 2005) 89–90; *Prosecutor v Vasiljević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) 102; *Simić* (n 43) 85–86; *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-A, 3 July 2008) 43.

⁵⁷ To that effect see *Taylor* (n 1) 475.

⁵⁸ *Prosecutor v Mrkšić and Šljivančanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No T-95-13/1-A, 5 May 2009) 159; *Blagojević and Jokić* (n 56) 189; *Furundžija* (n 38) 232; *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006) 285. Judge Liu argued to this effect in his partially dissenting opinion: ‘Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability’: *Perišić* (n 1) 3 (Partially Dissenting Opinion of Judge Liu).

approach and the ICTY's previous jurisprudence.⁵⁹ The judges in *Šainović et al* resolved this issue by assessing the legality of specific direction.⁶⁰ After an extensive review of the jurisprudence from the ad hoc criminal tribunals and the relevant post-World War II case law, they concluded that specific direction is not an element of aiding and abetting liability under customary international law or the Statute of the Tribunal.⁶¹

In the recent *Taylor* Appeal judgment, the Special Court for Sierra Leone (SCSL) also rejected the *Perišić* interpretation of the specific direction requirement.⁶² The SCSL did not, however, directly engage with custom. The *Taylor* Appeals Chamber circumvented this issue by framing its discussion of specific direction not along the lines of shaping the custom, but as a rejection of the ICTY precedent that is binding only internally.⁶³ The SCSL Appeals Chamber concluded that the definition of the *actus reus* of aiding and abetting under customary international law is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided.⁶⁴ Further, the *Taylor* appellate panel found no reason to depart from settled principles of law or to introduce the novel element of the specific direction in the definition of *actus reus* of aiding and abetting because the requirement that the acts of the accused have substantial effect on the commission of the crime establish sufficient causal link.⁶⁵ The judges further noted that the question of physical proximity between the accused and the crimes may be relevant on a case-by-case basis, but that proximity is not a legal requirement.⁶⁶

In modern international criminal law, a uniform approach by different courts and tribunals to a particular issue may serve as the evidence of consensus on a given topic, thus allowing for the possible formation of customary law. The international criminal law judgments referred to in the *Perišić* case do not support customary status of the specific direction component of *actus reus* for aiding and abetting. Moreover, the *Šainović et al* and the *Taylor* Appeals Chambers certainly weakened—if not disposed of—any possible emerging customary rule requiring the specific direction element. Nonetheless, the fate of this contested criterion has not yet been decided. It will reemerge in the *Stanišić and Simatović* appeal judgment.⁶⁷ Moreover, there are signs that the International Criminal

⁵⁹ *Šainović* (n 4) 1621.

⁶⁰ *ibid* 1622.

⁶¹ *ibid* 1649. Compare Judge Tuzmukhamedov argued that the case at hand did not merit consideration of the issue of the 'specific direction' for factual reasons—Lazarević's assistance was not remote—and reasons of legal certainty, stability and predictability. The majority did not provide cogent reasons for deviating from the *Perišić* judgment. See *Šainović* (n 4) 43, 45, 47 (Dissenting Opinion of Judge Tuzmukhamedov).

⁶² *Taylor* (n 1) 486.

⁶³ *ibid* 476.

⁶⁴ *ibid* 475.

⁶⁵ *ibid* 490.

⁶⁶ *ibid*.

⁶⁷ See, for example, Stuart Casey-Maslen (ed), *The War Report: Armed Conflict in 2013* (OUP 2013) 552.

Court (ICC) might in the future assess the significance of individual contributions to the crime committed by a group in light of the specific direction requirement.⁶⁸

2.2 Failure to qualify as a general principle of law

The problematic nature of custom within international criminal law inevitably shifts the focus to the third source of international law, namely the general principles of law deriving from the multitude of domestic legal systems.⁶⁹ The silence of the treaty and the uncertainty over custom make comparative criminal law crucial for resolving the question as to whether the definition of aiding and abetting includes the requirement of the specific direction. Article 38(1)(c) of the Statute of the International Court of Justice refers to the general principles of law recognised by civilised nations as one of the sources of international law. This is not to suggest that the meaning of ‘general principles of law’ is exceedingly clear in public international law. While this term receives different meanings depending on the context, there is some convergence in understanding that reference must be made to various domestic legal systems.

The *Šainović et al* Appeals Chamber took initiative to ‘probe’ this third source of international law to establish whether domestic law may help resolve the issue of specific direction.⁷⁰ The Chamber made brief reference to national law, correctly stating that the variations among national jurisdictions do not allow for the deduction of a common principle for the issue at hand.⁷¹ Accordingly, the substantive conclusion regarding the lack of a uniform rule for this aspect of aiding and abetting is also correct. However, the methodology that the Chamber used to assess domestic law is unclear. The judgment adopted a reductionist approach when grouping countries together without taking into account the specific features of different legal families and individual legal systems.⁷² To appreciate the judgment’s conclusion, it is important to understand the features of the law on aiding and abetting for each country. This individualised approach also adds credibility to the argument that the specific direction requirement is not rooted in domestic law.⁷³

Methodologically, there is no agreement on the number of countries that need to recognise a legal principle in *foro domestico* for it to qualify as a source of international

⁶⁸ *Prosecutor v Katanga (Judgment)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 8 March 2014) 287 (Dissenting Opinion of Judge van den Wyngaert). See also Sadat (n 10) 483.

⁶⁹ See Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 99; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1987) 2; Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008) 1.

⁷⁰ *Šainović* (n 4) 1643.

⁷¹ *ibid* 1644.

⁷² The overview of national case law is cramped together in three paragraphs and several lengthy footnotes. *ibid* 1643–46.

⁷³ It is peculiar that neither *Perišić* nor *Stanišić and Simatović* refer to the domestic law in support of the specific direction requirement. See *Perišić* (n 1) and *Stanišić and Simatović* (n 1).

law.⁷⁴ The jurisprudence of the ad hoc tribunals does not require universal acceptance of the legal principle by all states, but it is essential that the 'general principle' is *representative* of the variety of nations.⁷⁵ The legal systems under consideration below are the United States, England, Germany, France, Italy, and Poland, as these legal systems represent some of the major parent legal systems in the world.⁷⁶ The aim of this overview is to determine which, if any, of these legal systems recognise the specific direction requirement as part of the *actus reus* for aiding and abetting.⁷⁷

The US criminal law began as the 'common law' of England, which the American colonies adopted in the eighteenth century.⁷⁸ Much more recently, numerous US states introduced or reformed their criminal codes based on the 1962 Model Penal Code (MPC). The American Law Institute promulgated this code as a part of a major criminal law revision.⁷⁹ Neither the common law nor the MPC support the specific direction requirement as part of the *actus reus* of complicity. Under the common law, an accomplice is a person who, with the requisite *mens rea*, assists the primary party in committing an offence by physical conduct, psychological influence, or omission (assuming that there is a duty to act).⁸⁰ Once it is determined that the accomplice assisted the primary perpetrator, the degree of aid or influence is immaterial.⁸¹ A secondary party is accountable for the conduct of the primary party even if the assistance was causally unnecessary or the primary party would have committed the offence without the assistance of the secondary party.⁸² The required *mens rea* is 'dual intent', meaning the accomplice or secondary party must have the intent to assist the primary party and the intent that the primary party commits the offence charged.⁸³

The MPC provides that the accomplice satisfies the objective element of an offence through the perpetrator's conduct by solicitation, aiding, or failing the legal duty to prevent the commission of the offence.⁸⁴ Under the MPC, the mere knowledge of the

⁷⁴ Cheng (n 69) 25; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Frederick A Praeger 1950) 533.

⁷⁵ Fabian Raimondo, 'General Principles of Law, Judicial Creativity, and the Development of International Criminal Law' in Darcy and Powderly (eds) (n 30) 45, 52.

⁷⁶ Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (Tony Weir (tr), 3rd edn, OUP 1998) 40–41. For more empirical data see James Stewart, "'Specific Direction' is Unprecedented: Results from Two Empirical Studies" (*EJIL Blog*, 4 September 2013) <<http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/>> accessed 21 March 2015.

⁷⁷ Historically, domestic law nurtured international criminal justice, making resort to national law provisions relevant even outside the context of the discussion on the sources law. See Richard Overly, 'The Nuremberg trials: international law in the making' in Phillippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003).

⁷⁸ Paul H Robinson, 'Comparative Summary of American Criminal Law' in Kevin Jon Heller and Marcus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 563, 564.

⁷⁹ *ibid* 565.

⁸⁰ Joshua Dressler, *Understanding Criminal Law* (4th edn, LexisNexis 2006) 506.

⁸¹ *ibid* 508.

⁸² *ibid* 509.

⁸³ *ibid* 511.

⁸⁴ Model Penal Code, ss 2.06(2)(c), (3)(a) (US).

crime does not satisfy the fault requirement for complicity; rather, the accomplice must intend to participate in the crime's commission.⁸⁵ In *United States v Peoni*, the US Supreme Court held that the complicity doctrine requires the defendant to 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed'.⁸⁶ The MPC accords with this standard, but it features a less stringent fault requirement. Here, the accomplice's assistance does not need to be necessary or even substantial for the successful completion of the offence; instead, even the least degree of assistance suffices to satisfy the fault requirement.⁸⁷

The Polish Penal Code defines aiding and abetting as facilitating the commission of the prohibited act by providing the instrument or means of transport, giving counsel or information, or failing to act when a duty to act exists.⁸⁸ The accomplice must act with the intent that another person will commit a prohibited act (*zamiar*).⁸⁹ The code defines the objective element as 'facilitates by his behavior the commission of the act'.⁹⁰ For the subjective element, aiding and abetting must be intentional, yet in contrast with instigation, the intention may be expressed as direct or indirect intent.⁹¹ Even if the aider is not fully informed about the intent of the primary perpetrator but only foresees the possibility of the crime, the aider agrees to that crime by virtue of providing assistance.⁹² For example, the Polish Supreme Court held that forging invoices with the knowledge that they would be used to obtain an unlawful tax refund amounts to complicity in fraud.⁹³ Further, the court clarified that even if the aider and abettor does not necessarily want to commit an offence, it is sufficient that he reconciles himself with the idea. Thus, the aider and abettor must be aware of the legal characteristics of the offense, intend to facilitate it by a non-causal contribution, and be aware of the impact that his behavior will have, namely, that his behavior will facilitate the commission of the offense by the primary perpetrator.⁹⁴

In French law, the accomplice either facilitates the preparation or commission of the crime by aid and assistance, or incites its commission by means of a gift, promise, threat,

⁸⁵ Model Penal Code (US) s 2.06(2)(3)(a) provides that an accomplice acts with 'the purpose of promoting or facilitating the commission of the offence'. The same standard had been previously confirmed in *Nye & Nissen v United States*, 336 US 613 (1949).

⁸⁶ 100 F 2d 401, 402 (2d Cir 1938).

⁸⁷ *People v Durham*, 70 Cal 2d 171, 185 (1969); *Commonwealth v Murphy*, 844 A 2d 1228, 1234 (Pa 2004); *Commonwealth v Gladden*, 665 A 2d 1201, 1209 (Pa Super 1995).

⁸⁸ Penal Code, art 18(3) (Poland).

⁸⁹ *ibid*.

⁹⁰ Tadeusz Bojarski and others (eds), *Kodeks karny; Komentarz do cz OGÓLNA roz II art 18*, 2013, (wydanie VI 2013).

⁹¹ *ibid*.

⁹² Leon Tyszkiewicz and others (eds), *Kodeks karny. Komentarz do cz OGÓLNA roz II art 18* 2012, (wydanie III 2012).

⁹³ Wyrok Sądu Najwyższego—Izba Karna (Judgment of the Supreme Court), III KK 184/2013.

⁹⁴ *ibid*.

order, an abuse of authority or powers, or gives the directions to commit it.⁹⁵ Criminal liability of the accomplice presupposes that the underlying act is objectively punishable.⁹⁶ Complicity requires a positive act, inaction is not sufficient.⁹⁷ The aid of the accomplice does not need to be indispensable for the commission of the offence.⁹⁸ The emphasis of French law is on the mental element: it must be established that the accomplice furnished the aid with the knowledge that it supports the crime.⁹⁹ Thus, the French commentaries specify that while knowledge of the illegal enterprise and voluntary participation are essential, it matters little whether the objectives of the accomplices are different from those of the primary perpetrator.¹⁰⁰

German law defines an aider and abettor (*Gehilfe*) as 'any person who intentionally assists another in the intentional commission of an unlawful act'.¹⁰¹ At minimum, an aider and abettor must have indirect intent or possess the knowledge of the risk or likelihood for the effect to occur and the will to bring it about.¹⁰² The intent for aiding and abetting is 'double' (*doppelter*). Accordingly, demonstrating intent requires fulfilling two elements. First, the act of assistance must have a supportive effect on the commission of the offence. Second, the aider and abettor must direct the act towards the illegal action, although he or she does not need to detail every element of the offence.¹⁰³ Because the aider and abettor does not have the will to exercise certain influence on the offence, the requirement for the specificity of his knowledge is less stringent compared to instigation.¹⁰⁴ The standard linking the act of the aider and abettor and the offence is quite low. Once the aider and abettor furthers the actions of the principal in some way, German courts consider the standard met.¹⁰⁵ Further, German commentaries define assistance from the aider and abettor as a causal contribution that enables, enhances, or facilitates the commission of the offence, but that *does not* amount to perpetration or incitement. These commentaries also hold that whether the act would have been committed without the help of the aider and abettor is irrelevant.¹⁰⁶

⁹⁵ Penal Code, art 121.7 (France).

⁹⁶ Herve Pelletier and Jean Perfetti (eds), *Code Penal* (14th edn, LexisNexis 2002) 29.

⁹⁷ *ibid* 30–31.

⁹⁸ *ibid* 32.

⁹⁹ Yves Mayaud and Emmanuelle Allain (eds), *Code Penal* (104th edn, Dalloz 2007) 126.

¹⁰⁰ *ibid* 123.

¹⁰¹ Penal Code, art 27(1) (Germany) (official translation provided by Federal Ministry of Justice and for Consumer Protection <http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0148> accessed 5 May 2015).

¹⁰² BGH NJW1998 (Federal Supreme Court) 2835 as cited by Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 169.

¹⁰³ Karl Lackner and Kristian Kühl, *Strafgesetzbuch: StGB Kommentar* (25th edn, C H Beck 2004) 195.

¹⁰⁴ *ibid*.

¹⁰⁵ BGHSt2, 130 (Federal Supreme Court); BGH NJW 2001 (Federal Supreme Court) 2410 as cited by Bohlander (n 102) 172.

¹⁰⁶ Lackner and Kühl (n 103) 191.

The accomplice in English law (sometimes called an ‘accessory’ or a ‘secondary party’) is anyone who aids, abets, counsels, or procures a principal.¹⁰⁷ ‘Procuring’ implies bringing about an offence, as by deceiving another so that he or she commits an offence.¹⁰⁸ Procuring is the only act that requires a causal relationship between the accomplice’s act and the commission of the crime, namely the act of procurement and the resulting execution of the offence.¹⁰⁹ The remaining three acts do not require a causal relationship. The term ‘counsels’ presupposes that the accused is responsible if he persuades the principal to commit an offence, not by threats or bribes, but by detailing the advantages of the proposed course of action or by giving advice to the principal offender.¹¹⁰ Abetting entails encouraging the principal to commit the offence.¹¹¹ Here, there must be some connection between abetting or counseling and the execution of the crime, but the connection does not require causality in the sense of being *conditio sine qua non*, in a sense that the assistance need not be indispensable for completing the offence.¹¹² Complicity requires proof of intention, but not purpose, and *dolus eventualis* (or ‘adverted recklessness’) may be sufficient.¹¹³ Importantly, the test for accessorial knowledge is whether the offence committed was within the contemplated range of offences, and if not, then whether it was of the same type as any of those offences contemplated.¹¹⁴

In Italy, the all-encompassing term ‘participation’ (*concorso di persone*) expresses the notion that any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime.¹¹⁵ The acts of each co-participant are his or her own. These acts are attributed to all of the other participants if two conditions are met. The first condition is objective and requires that there is a causal link between the acts and the criminal result. The second condition is subjective and requires that each participant is aware of the final purpose of all the actions. Accordingly, each participant must deliberately and consciously give his or her contribution—material or intellectual—to the commission of the crime.¹¹⁶ Thus, for a person to qualify as a party to a crime in Italy, it is sufficient that the person willingly contributes to the commission of the offence

¹⁰⁷ Andrew Ashworth, *Principles of Criminal Law* (2nd edn, OUP 1995) 410. See also Accessories and Abettors Act 1861, as amended by s 65(4) Criminal Law Act 1977.

¹⁰⁸ Andrew J Ashworth, ‘UK Criminal Law’ in Heller and Dubber (eds) (n 78) 531, 539.

¹⁰⁹ J C Smith and Brian Hogan (eds), *Criminal Law* (10th edn, LexisNexis 2002) 145; Ashworth (n 107) 422.

¹¹⁰ HLA Hart and T Honoré, *Causation in the Law* (Clarendon Press 1985) 380.

¹¹¹ Ashworth (n 107) 414.

¹¹² *Wilcox v Jeffery* [1951] 1 All ER 464 as cited by Ashworth (n 107) 416.

¹¹³ *Blakeley v Chief Constable of West Mercia* [1991] RTR 405 as cited by Ashworth in Heller and Dubber (eds) (n 108) 539.

¹¹⁴ KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991) 167–169, referring to *Maxwell v DPP* [1978] 1 WLR 1350 and *R v Bainbridge* (1960) 1 QB 129.

¹¹⁵ Penal Code, art 110 (Italy).

¹¹⁶ CCC, 1st division (Supreme Court of Cassation), n 8084, 4 July 1987.

and that his input constitutes necessary support for its commission.¹¹⁷ Finally, the contribution need not be *conditio sine qua non* and may take many different forms.¹¹⁸

This brief survey of national laws shows that several important legal systems do not embrace the idea that accomplice aid must be directed towards the specific offence in the meaning that the *Perišić* Appeals Chamber adopted. When it comes to the specificity of the assistance furnished by the accessory, the domestic law assessed above emphasises the *mens rea* rather than the *actus reus* as the link between the assistance and the offence. This link is established through the mental state of the accomplices, rather than the directness of their aid. The level of contribution required to attach criminal responsibility for complicity varies depending on the legal system. Still, none of the legal systems reviewed above require that the assistance is a precondition for the predicate offence. Finally, these legal systems suggest that a higher *mens rea* threshold for aiding and abetting results in a lower conduct requirement.

3 Conceptual problems

The specific direction requirement lacks a solid foundation within the sources of international law as well as the domestic legal systems discussed above. In addition, including the specific direction requirement as part of the *actus reus* for aiding and abetting presents a number of conceptual difficulties. First, the new requirement undermines the use of accomplice liability to address situations where the accused is removed from the scene of the crime. The specific direction requirement creates an enhanced version of aiding and abetting that purports to bridge the temporal and/or spatial gap between the accomplice and the principal perpetrator. In *Perišić*, the judges justified including the specific direction element in the *actus reus* of aiding and abetting to expressly establish the link between the accomplices' contribution to the offence and the wrongdoing in cases when the accused is removed from the offence. The *Perišić* judges contrasted this situation with instances where the accomplice is physically close to the crime and the link is implied.¹¹⁹ However, physical proximity is often a false friend for establishing this connection. For example, even if an accomplice is present at the scene of the crime, he may not directly participate in its perpetration, thus prosecutors often infer his contribution to the offence from the available evidence.¹²⁰

Linking the assistance and the crime via the directness and the specificity of the aid is misplaced. This argument is partially due to the lack of a well-defined causation

¹¹⁷ Sergio Beltrani, Raffaele Marino and Rossana Petrucci, *Codice Penale: Annotato con la Giurisprudenza* (Simone 2003) 429.

¹¹⁸ CCC, 1st division (Supreme Court of Cassation), n 8084, 4 July 1987.

¹¹⁹ *Perišić* (n 1) 38. Compare *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No 99-36-T, 1 September 2004) 151, 273, 277, 348.

¹²⁰ For example, Furundžija's contribution was inferred from his position of authority: *Furundžija* (n 38) 209.

standard for complicity in international criminal law.¹²¹ Domestic criminal law teaches us that the causal link between the accomplice and the crime is always constructed and that the connection stems more from the risk that the secondary party envisages and undertakes rather than the actual harm produced by their actions.¹²² Hence, it is the mental state of the accomplice that grounds his or her relationship to the offence rather than the conduct. If one accepts that distance is not dispositive for establishing the effect of the accessory's contribution to the offence, then the whole reason for the specific direction requirement falls away because there is no longer a need to compensate for the distance by adding additional requirements to the *actus reus* of complicity. Importantly, this misinterpretation is more than an academic debate, as the enhanced specific direction standard may lead to impunity gaps, where culpable actors exert a substantial effect on the crime, but do not attract criminal responsibility for the mere lack of physical proximity between the crime and their assistance. As a result, the leadership of the criminal conduct becomes nearly immune from prosecution for aiding and abetting because persons in charge are frequently removed from the offence.

Second, the additional criterion requiring a direct link between the contribution and the crime brings aiding and abetting into the vicinity of commission because it conflates assistance with performing part of *actus reus* of the offence itself—the former, in contrast with the latter, need not be the direct cause of the crime. Judge Liu, who partially dissented in *Perišić*, noted this problematic aspect of the specific direction requirement.¹²³ The essence of ‘committing’ the offence, as opposed to being an accomplice, is bringing about its material elements.¹²⁴ This is done by the direct engagement in the crime. Thus, the qualitative criterion of ‘direct contribution’ is better suited to describe the *actus reus* of co-perpetration, while the quantitative criterion of ‘substantial contribution’ serves to assess the impact of the accomplice's aid, which does not need to be a precondition for the offence.¹²⁵

Third, the specific direction requirement is superfluous and lacks independent standing. One can view this requirement either as an implied element of substantial contribution, in the sense that an accomplice's actions have some impact on the conduct of the principal and are thus *directed* towards the crime, or as part of the accused's *mens rea* for aiding and abetting, which in the ICTY jurisprudence is the knowledge that the accomplice's acts assist in the commission of the offence.¹²⁶ If the accused knew about the crime and still provided assistance, then logically his acts are directed towards the

¹²¹ Mettraux (n 27) 281.

¹²² Christopher Kutz, ‘The Philosophical Foundations of Complicity Law’ in John Deigh and David Dolinko (eds), *The Handbook of Philosophy of Criminal Law* (OUP 2011) 157.

¹²³ *Perišić* (n 1) n 9 (Partially Dissenting Opinion of Judge Liu).

¹²⁴ See *Prosecutor v Mathieu Ngudjolo Chui* (International Criminal Tribunal, Trial Chamber II, Case No 01/04-02/12-4, 18 December 2012) 44 (Concurring Opinion of Judge van den Wyngaert).

¹²⁵ *ibid.*

¹²⁶ For example *Furundžija* (n 38) 249; *Blagojević and Jokić* (n 56) 127; *Prosecutor v Gotovina and Markač (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-06-90-A, 16 November 2012) 127.

offence.¹²⁷ Further, the previous survey of domestic laws on complicity supports the idea that it is the specificity of accomplice's knowledge, rather than the specific direction of his acts, that establish his connection to the offence.

Fourth, the two constituent elements of aiding and abetting are interconnected. As such, judges should interpret the *actus reus* and *mens rea* of aiding and abetting not as two separate inquiries, but as two interdependent parts of one analysis. The *Perišić* Appeals Chamber attempted to consider these elements separately by stressing that it would only focus on the *actus reus* of aiding and abetting.¹²⁸ A better approach is to balance the two elements based on the facts of the particular case.¹²⁹ By making the conduct requirement more stringent without simultaneously lessening the fault requirement or removing the requirement that the contribution of the accused must be substantial skews the construction of complicity. The *Taylor* Appeal judgment hinted towards adapting a more balanced approach to assessing the two elements of aiding and abetting by drawing on the example of the MPC. The MPC requires 'purpose', instead of the more widely accepted 'knowledge', as the mental element for aiding and abetting because this approach allows for *any* contribution to the crime to qualify as the conduct element.¹³⁰ In contrast, international criminal law requires a 'significant' or 'substantial' contribution to satisfy the conduct requirement.

Finally, to require that aid is specifically directed towards the crime, and not just to establishing effective control or other military objectives—even when the assistance is provided with knowledge and facilitates the commission of offences—raises an uncomfortable question that goes beyond the legal technicalities of a particular mode of liability, namely, what are the conditions that turn the 'general war effort' into a 'crime' attracting individual criminal responsibility? Relatedly, what is the standard of behavior that we expect from senior military and political leadership during armed conflict?

Here, the recent acquittals on appeal of General Ante Gotovina and Croatian Police Operation Commander Mladen Markač are relevant.¹³¹ The rationale for their acquittals was the reversal of the Trial Chamber's finding that the artillery attacks planned and ordered by the accused were unlawful. In these cases, the Prosecution maintained that even if the attacks were lawful, the Appeals Chamber should find Gotovina and

¹²⁷ Judges Meron and Agius, in their joint separate opinion in *Perišić*, noted that 'whether an individual specifically aimed to assist relevant crimes logically fits within our current *mens rea* requirement': *Perišić* (n 1) 2–3 (Joint Separate Opinion of Judges Meron and Agius). See also *Perišić* (n 1) n 7 (Partially Dissenting Opinion of Judge Liu).

¹²⁸ *Perišić* (n 1) 48: 'The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*.'

¹²⁹ KJM Smith, who studied complicity in depth, noted 'complicity's derivative quality must convincingly reside at least in either *mens rea* or *actus reus* components (...) diminution in demands on the *mens rea* side have repercussions for the causal element as part of the *actus reus*; and vice-versa': Smith (n 114) 195 (emphasis added). See also *Taylor* (n 1) 715 (Concurring Opinion of Justice Shireen Avis Fisher on Aiding and Abetting Liability).

¹³⁰ *Taylor* (n 1) 447. Smith pointed out that American jurisdictions requiring purposeful accessorial attitudes experience less problems with specificity: Smith (n 114) 171.

¹³¹ *Gotovina and Markač* (n 126).

Markač guilty of aiding and abetting deportation and persecution because they ordered these attacks knowing that they would substantially contribute to deportation of the civilian population.¹³² The Appeals Chamber rejected this argument, claiming that the departure of civilians is concurrent with lawful artillery attacks and cannot be qualified as deportation.¹³³

The grounds for the acquittals of Perišić, Stanišić and Simatović, on the one hand, and Gotovina and Markač, on the other, are different. The former failed to qualify as accomplices because their assistance was not specifically directed towards the crimes, and thus could have been interpreted as aiming at achieving lawful military purposes. The latter were acquitted because the Appeals Chamber overturned as arbitrary the 200-meter yardstick for measuring the lawfulness of an artillery attack. The trial judges based convictions in the *Gotovina* case on an expert opinion holding that all impact sites located further than 200 meters from the legitimate military target serve as evidence of an unlawful attack. The rejection of this standard led the appellate judge to the conclusion that the attacks were lawful and any incidental damage to civilians resulting from them does not entail individual criminal responsibility.¹³⁴

Despite factual and legal differences in these rulings, the underlying logic is analogous. In each case, the judges adopted an objective approach to military activities, while shifting the emphasis from the mental state of the accused to the objective and gruesome reality of armed conflict. The acquittals share this expansive view of the 'general war effort', which does not attract individual criminal responsibility. Accepting that armed conflict is an ugly affair that inevitably affects civilians or results in some level of criminality is a reasonable position. And this view likely framed the legal discourse around the recent ICTY acquittals. Nonetheless, the question remains as to whether international criminal law should focus on the individual contribution and the mental state of those in charge or the externalities accompanying military activities. Depending on the answer to this question, we can form better expectations of those persons vested with authority during armed conflict.

4 Conclusion

Interpreting the *actus reus* for aiding and abetting to require that assistance must be specifically directed towards the crimes and not just geared to the general war effort is problematic for several reasons. Foremost, this requirement violates the principle of legality because it does not find support in the sources of international law. As this article demonstrates, this requirement lacks recognition within customary international law or as a general principle of law. Instead, the specific direction requirement is the result of

¹³² *ibid* 111.

¹³³ *ibid* 114.

¹³⁴ *ibid* 25.

a creative interpretation of the early *Tadić* appeal judgment, which contrasted criminal responsibility for aiding and abetting with criminal responsibility for common design.

This interpretation of the *actus reus* element of aiding and abetting also undermines the intended purpose of accomplice liability as the mode of criminal responsibility best suited to address situations where the accused accomplice is removed from the scene of the crime. While this interpretation attempts to bridge the temporal or spatial gap between the accomplice and the principal perpetrator by requiring a showing of a direct and specific contribution to the offence, this interpretation distorts the *actus reus* element and disregards settled ICTY jurisprudence. Indeed, the interpretative emphasis should not be on compensating for the gap between the accomplice and the perpetrator by adding additional requirements to the *actus reus* of complicity, but on the level of knowledge of the accused and the effect that his assistance has on the crime. The specific direction requirement also brings aiding and abetting into the vicinity of commission, thereby confusing the legal standard for both crimes. Finally, this restrictive interpretation of aiding and abetting highlights a fundamental concern for international criminal law, as judges continually lower the expectations for persons vested with authority during armed conflict. This outcome raises serious concerns regarding the justness of international criminal law practice and undermines the core value of international criminal law: ending impunity.